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Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1953

No. ~~744~~ 44

AVONDALE MARINE WAYS, INC.,

Petitioner,

against

JOSEPH H. HENDERSON, Deputy Commissioner, MRS. VIOLA CAMPBELL, WELMAR LEE CAMPBELL, THELMA CAMPBELL, RONA MAY CAMPBELL, ARTHUR CAMPBELL, JR., ROGER CAMPBELL, CLARENCE RUNDLES CAMPBELL, EDNA ANN CAMPBELL, LIONEL FOSTER CAMPBELL and BRENDA JOYCE CAMPBELL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

FRANK A. BULL and ASHTON PHELPS,
Counsel for Petitioner.

JOHN W. SIMS,
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Bowne & Co., Inc., 163 Front Street, New York 38

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AVONDALE MARINE WAYS, INC.,
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JOSEPH H. HENDERSON, Deputy Commissioner, MRS. VIOLA CAMPBELL, VELMAR LEE CAMPBELL, THELMA CAMPBELL, RONA MAY CAMPBELL, ARTHUR CAMPBELL, JR., ROGER CAMPBELL, CLARENCE RUNDLES CAMPBELL, EDNA ANN CAMPBELL, LIONEL FOSTER CAMPBELL and BRENDA JOYCE CAMPBELL,
Respondents.

PETITION FOR WRIT OF CERTIORARI

The petition of Avondale Marine Ways, Inc. respectfully shows to this Honorable Court as follows:

Summary Statement of the Matter Involved.

This is a petition by Avondale Marine Ways, Inc., employer, for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review a decision and judgment of that Court (R. 125-8), which affirmed a final judgment of the United States District Court for the Eastern District of Louisiana (R. 116) dismissing petitioner's complaint in a suit to enjoin and set aside a compensation order and award of respondent Joseph H. Henderson, Deputy Commissioner, in favor of the other re-

spondents, under the Longshoremen's and Harbor Workers' Compensation Act (R. 10-18). The petitioner's action to set aside the compensation order and award was based on the Deputy Commissioner's lack of jurisdiction or authority to make an award because the accident involved occurred on land and not on the navigable waters of the United States or a dry dock (Complaint, R. 4-9). There is only a question of law involved, as the facts are either stipulated or not controverted (R. 31-99, 125, 201 F. 2d 438, Note 2).

The facts involved in this litigation are as follows:

Petitioner is a Louisiana corporation owning and operating a marine repair yard on the Mississippi River at Avondale, Louisiana (R. 33). On August 20, 1951, Arthur Campbell, a laborer in the employ of petitioner, was cleaning on a barge known as the Walter Russ when a flash explosion occurred on the barge, causing his death (R. 10-11, 31-2). At the time of the accident the barge, which was not owned by the petitioner, was on a cradle of petitioner's marine railway at said yard, around 400 feet from the river's edge. No part of the barge, or of the cradle on which it had been hauled ashore and then rested, was in, on or over any water (R. 11, 32, 125 note 2). The respondents, other than the Deputy Commissioner, are the widow and children of said Arthur Campbell, deceased (R. 12-16, 33-5).

A similar action involving another employee, Joseph D'Arensbourg, in the same explosion was brought by the same plaintiff against the same Deputy Commissioner and the widow and children of the decedent. The two actions involved identical facts, except for the names of the decedents and other interested parties, and they were consolidated in the District Court, on motion of the Deputy Commissioner (R. 18-19), and the District Court granted summary judgment upholding the Deputy Commissioner's

awards in both cases (R. 115-16). In the Court of Appeals the two cases were consolidated for briefing and hearing on the record in the *Campbell* case (R. 2-3). This petition is based on the record in the *Campbell* case, an order having been entered in the Court of Appeals that the judgment in the *D'Arensbourg* case will abide the final decision in the *Campbell* case (R. 130), as both cases involve the same issues.

Statutes Involved.

This case involves the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 903(a), 44 Stat. 1426 which provides:

> "Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, *but only if* the disability or death results from an injury *occurring upon the navigable waters* of the United States (including any dry dock) *and if* recovery for the disability or death through workmen's compensation proceedings *may not validly be provided by state law* * * *." (Italics supplied.)

There is also involved the Louisiana Workmen's Compensation Act, Louisiana Revised Statutes of 1950, Title 23, §§ 1031 and 1035, the pertinent provisions of which are:

> "Section 1031. If an employee not otherwise eliminated from the benefits of this Chapter, receives personal injury by accident arising out of and in the course of his employment, his employer shall pay compensation in the amounts, on the conditions, and to the person or persons hereafter designated.
> * * *"
>
> "Section 1035. The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation in the following hazardous trades, businesses and occupations:

> The operation, construction, repairs, removal, maintenance and demolition of railways and railroads, vessels, boats, and other water crafts, terminal docks, * * *."

The Deputy Commissioner's Compensation Order and Award.

The Deputy Commissioner made awards to the other respondents under the Longshoremen's and Harbor Workers' Compensation Act (R. 10-18), accepting jurisdiction even though the decedent's death did not result "from an injury occurring upon the navigable waters of the United States (including any dry dock)" and even though recovery for the death through workmen's compensation proceedings could validly be provided by the State of Louisiana, and was provided for by the Louisiana Workmen's Compensation Act (R. S. 23:1035).

The District Court Decision.

No opinion was written by the District Court, but it merely granted summary judgment against the petitioner following two earlier decisions of the Circuit Court of Appeals for the Fifth Circuit (R. 115-16).

The Court of Appeals Opinion.

The Court of Appeals, whose opinion is reported in 201 F. 2d 437 (R. 125-7), also followed its two earlier decisions and, one judge dissenting, affirmed the summary judgment of the District Court.

The dissenting judge stated his reasons for his dissent, namely, that the accident occurred "over dry land some four hundred feet from the river's edge" and, since "Congress made clear its purpose to permit state compensation protection whenever possible", the Longshoremen's and

Harbor Workers' Compensation Act cannot apply on land, "the natural habitat of the state compensation acts."

The majority opinion merely reaffirmed that Court's earlier decisions in *Continental Casualty Company* v. *Lawson*, 64 F. 2d 802 (a 2-to-1 decision), and *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, and its reasons must be obtained from its opinions in those cases where it held (1) that the words "any dry dock" in the Act include a marine railway (even on land), (2) that Congress had power, and intended, to cover accidents on a marine railway, and (3) that Congress exercised exclusive jurisdiction over such cases, thus superseding any state compensation laws.

Prior to the Longshoremen's and Harbor Workers' Compensation Act accidents ashore on marine railways were matters within the state law, and the Court apparently ignored the fact that that Act was intended to "permit state compensation protection whenever possible" (*Davis* v. *Department of Labor and Industries*, 317 U. S. 249, 252-3) and excludes "any remedy against the employer for injuries inflicted ashore" (*Swanson* v. *Marra Bros.*, 328 U. S. 1, 7). It held that Congress could make the Act applicable to such accidents, and therefore it did so to the exclusion of any state compensation laws.

The Question Presented.

The question presented is solely one of law, i.e., whether the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. § 901 et seq., or the Louisiana Workmen's Compensation Act, Louisiana Revised Statutes of 1950, Title 23, § 1035, is applicable to injuries to, or death of, an employee doing cleaning work on a barge after it has been hauled out of a river on the cradle of a marine railway and is at rest on land some 400 feet from the river's edge. The determination of this question depends on

A. Whether such an accident (1) occurs "upon the navigable waters of the United States (including any dry dock)," and (2) recovery for it "through workmen's compensation proceedings may not validly be provided by state law." Both these conditions precedent are stated in the Longshoremen's and Harbor Workers' Compensation Act to be necessary to jurisdiction under it.

B. Whether such an accident is within the constitutional grant of exclusive admiralty jurisdiction. Constitution, Article III, § 2.

C. Whether Congress could make the Longshoremen's and Harbor Workers' Compensation Act apply to such an accident; and, if so, whether the Act does apply to all accidents to which Congress could extend it, notwithstanding it expressly provides that it covers "only" where state law cannot validly provide a compensation recovery.

Jurisdiction.

1. The date of the decision and judgment of the Court of Appeals for the Fifth Circuit is January 28, 1953.

2. This is a proceeding under § 921(b) of the United States Code, Title 33; with jurisdiction of this Court granted by Article III, § 2, of the Constitution of the United States.

3. The jurisdiction of this Court to review this case on a writ of certiorari is invoked under 28 U. S. C. § 1254.

Reasons Relied on for the Allowance of the Writ.

1. The decision below is untenable on the jurisdictional requirements of the Longshoremen's and Harbor Workers' Act, and in conflict with the construction of that Act by this

Court in *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244; *Davis* v. *Department of Labor and Industries*, 317 U. S. 249; and *Swanson* v. *Marra Bros.*, 328 U. S. 1.

2. The decision below is contrary to, and in conflict with, the decision of the Circuit Court of Appeals for the Third Circuit in *Norton* v. *Vesta Coal Co.*, 63 F. 2d 165 and decisions of District Courts in other circuits, which will be referred to in the brief in support of this petition.

3. The decision below decides an important question of local law in a way in conflict with the Louisiana State statute.

4. The decision below would allow an exercise of jurisdiction to award compensation contrary to law, and without statutory authority.

5. The decision below imposes on petitioner a liability not authorized by law which amounts to the taking of property without due process of law.

6. The decision below has so far sanctioned the Deputy Commissioner's usurpation of unauthorized power and jurisdiction as to call for the exercise of this Court's power of supervision.

The legal issue involved is of great general importance and should be settled to the end that the application of the Longshoremen's and Harbor Workers' Compensation Act will be uniformly applied throughout the country, and the various states will understand the Federal limitations upon their own workmen's compensation statutes. The decision below is in conflict with decisions in other circuits, whereas there should be a uniform application of this Federal Act in all circuits, which can only be accomplished by this Court in the exercise of its power of supervision.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of this Honorable Court to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, entered on January 28, 1953, to the end that they may be reversed by this Honorable Court; and that your petitioner may have such other and further relief as may be just and proper in the premises.

AVONDALE MARINE WAYS, INC.

By FRANK A. BULL and
ASHTON PHELPS
Counsel

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Facts.

A statement of the facts and the legal question involved, the statutes involved, the decisions and opinion below, and the jurisdiction in the matter have been set out in the petition, and, in the interest of brevity, they will not be repeated in this brief.

II.

Specification of Errors.

The Court of Appeals erred in the following respects:

1. In holding that a marine railway is a dry dock within the intent and meaning of the Longshoremen's and Harbor Workers' Compensation Act (herein called the Longshoremen's Act),

2. In holding that the Longshoremen's Act applies to an accident ashore on a marine railway, regardless of whether the State of Louisiana could otherwise validly provide a recovery through compensation proceedings.

3. In holding that the Louisiana Workmen's Compensation Act, which expressly covers work on "vessels, boats and other water craft," cannot apply to the accident involved.

4. In misconstruing the express language of the Longshoremen's Act, and holding that it extends the right to Federal compensation to accidents ashore because it was within the power of Congress to do so.

5. In holding that Congress intended, contrary to its expressed intention and to the intention disclosed by the Act itself, to cover accidents ashore on marine railways.

6. In holding that the Longshoremen's Act determines the validity of state compensation acts and their applicability to accidents ashore on a marine railway.

7. In sanctioning the Deputy Commissioner's assumption of jurisdiction, without statutory authority.

8. In taking property without due process of law.

III.

Argument.

The Court of Appeals followed its earlier decision in *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, in which the majority held that it was within the power of Congress to grant compensation to employees working ashore on a marine railway, and consequently the Longshoremen's Act covers such employees, to the exclusion of any state compensation law; and that the words "any dry dock" in the Longshoremen's Act were intended to include a marine railway. As the whole theory of the Court below is disclosed in that decision, for the sake of brevity and to avoid unnecessary repetition of court opinions, we will cover the subject generally, rather than under separate points.

Since the *Lawson* decision, this Court has stated that the Longshoremen's Act does not apply to accidents other than those within the exclusive admiralty and maritime jurisdiction, which are beyond the reach of the states, *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 249-50, and that it left compensation remedies to the states whenever possible, *Davis* v. *Department of Labor and Industries*, 317 U. S. 249, 252-3; and in *Swanson* v. *Marra Bros.*,

328 U. S. 1, 7, this Court said the Longshoremen's Act is restricted to injuries on navigable waters and "excludes from its own terms * * * any remedies against the employer for injuries inflicted on shore," leaving such cases to "the remedies afforded by the local law," and "permits recovery against the employer for injuries inflicted by land torts" under state compensation acts.

State compensation acts were first adopted about 1911, and the first important case decided by this Court on the applicability of a state compensation statute to a maritime personal injury was *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, where it was held in 1917 that an accident occurring on navigable water is within the admiralty jurisdiction and consequently a state compensation statute could not apply to it. That case has been followed ever since, except in some cases, hereinafter cited, in which a state compensation law was held to apply even to accidents on navigable waters if the work being performed was of merely local concern. In *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, the injury occurred on a partially completed vessel in navigable water and this Court held that, although the accident was within the general admiralty jurisdiction, a state compensation act providing an exclusive remedy abrogated the admiralty jurisdiction which otherwise would exist.

The Longshoremen's Act was enacted in 1927 and provided for compensation "only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law." It would seem evident from this language that Congress intentionally imposed two conditions precedent to the exercise of jurisdiction under that Act.

The first case we know of involving a marine railway and the Longshoremen's Act is *Colonna's Shipyard* v. *Lowe*

(E. D. Va., 1927), 22 F. 2d 843, in which it was held that the Act is applicable only if compensation cannot be provided by state law; and that a compensation remedy for an injury on a vessel hauled out of the water onto dry land by a marine railway can validly be provided by state law.

The next marine railway case was *Giske* v. *Austrem and Sandstrom*, decided by the Superior Court of Washington in 1931, but apparently reported only in 1931 A. M. C. 1200. There a man injured on a vessel on a marine railway sued his employer at law, and the Court granted a motion to strike out an allegation that he elected to sue under the Jones Act, saying:

> "If this injury had occurred while the vessel was in a floating dry dock, admiralty jurisdiction would attach. (Citing cases.) And it is clear that that jurisdiction would attach if the vessel were in a graving dock, for in such a dock the vessel is floated in, and the water is merely temporarily withdrawn. Such a dock is within the ebb and flow of the tide.
>
> "• • •
>
> "It is clear therefrom that the Butler decision is grounded upon the fact that the interior of a graving dock is in navigable water, in other words, within the flow of the tides. Gates and pumps will not shut out jurisdiction.
>
> "The very reasoning of the learned judges in the Butler case negatives the jurisdiction of admiralty where water has not flowed and cannot flow. A vessel, on marine ways, is out of water, above reach of water, and has not been floated in place" (pp. 1201-2).

Next came *Continental Casualty Co.* v. *Lawson* (D. C. Fla., 1932), 2 F. Supp. 459, and *Vesta Coal Co.* v. *Norton*, decided by a Pennsylvania District Court, but apparently unreported except as quoted in the appeal, *Norton* v. *Vesta Coal Co.* (C. C. A. 3rd), 63 F. 2d 165. In the former case

a marine railway was held to be included in the words "any dry dock" as used in the Longshoremen's Act. In the latter case, the holding was to the contrary, that is, that an injury ashore on a marine railway was not within the Longshoremen's Act, as it was not on navigable water and recovery could be provided by a state compensation statute.

The District Court decision in the *Norton* case was affirmed in January, 1933, in a 2-to-1 decision, the Circuit Court of Appeals for the Third Circuit saying:

> "* * * the contention is that Congress meant to include in the term 'dry dock' a marine railway. We cannot make such assumption or speculation. * * * With these terms describing two different structures, it seems clear that, when Congress used the word 'dry dock,' it means a dry dock in the common acceptation of the term, and did not intend to include any other thing. We rest on firm ground when we take Congress at its word. We enter into a field of speculation when we impute to Congress an intent to include something it did not say it included. The mention of one of a class is the exclusion of others." 63 F. 2d at page 166.

The contrary decision of the Florida District Court in the *Lawson* case was affirmed on appeal (insofar as the question here involved is concerned) in March, 1933, in a 2-to-1 decision, the majority opinion stating:

> "It was within the power of Congress to extend to employees working on marine railways the same right to compensation for injury received in the course of their employment that it admittedly has provided for employees working on floating and graving dry docks * * *." 64 F. 2d at page 804.
>
> "State compensation laws and this compensation law of Congress are mutually exclusive of each other. The existence of the Act of 1927 must be taken into consideration and given effect in determining whether under Section 3 (33 U. S. C. A. § 903) thereof the compensation laws of the states are valid

> and applicable; for state laws cannot now validly apply to a subject-matter over which Congress has exercised its exclusive juirisdiction. In our opinion it was not the intention of Congress to provide compensation for harbor workers only while they were working on ships that had been placed on floating or graving docks and to deny compensation if the same employees happened to be repairing a vessel on a marine railway. * * * The use of the phrase 'including any dry dock' in Section 3 discloses also an intention to exclude the ordinary cargo dock or wharf; to distinguish between the making of repairs to ships and the handling of cargo on shore; to assume jurisdiction over the former but not over the latter class of work." 64 F. 2d at page 805.

We submit that the question is not whether Congress could have extended the Longshoremen's Act to cover injuries on marine railways, but rather whether it did so or even intended to do so; and this Court has agreed with that interpretation in decisions which we will refer to shortly. The Circuit Court of Appeals for the Fourth Circuit said, in *United States Casualty Co.* v. *Taylor* (1933), 64 F. 2d 521, 523-4:

> "We are not concerned with the power of Congress to include within the scheme of a federal compensation law the kind of employment involved in this case, unless it appears that it was the intention of Congress to cover it within the terms of the act. * * * Congress intended to occupy only a portion of the field (the crews of ships being excepted) from which the states are excluded, and to abstain altogether from duplicating the work of the states in the field which they are permitted to enter. * * * It was the original policy of Congress to leave to the states, as far as possible, to provide compensation to workers for industrial accidents, and this policy has been continued in the present statute. It is noteworthy that by this course of action the requirement of uniformity in matters of admiralty and maritime jurisdiction is observed."

In *Crowell* v. *Benson*, 285 U. S. 22, 55, this Court said:

> "In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction."

The Court below conceded that the Longshoremen's Act and state compensation laws "are mutually exclusive of each other," but then proceeded to say that it was not the intent of Congress to exclude employees repairing a vessel on a marine railway (ashore), although it did intend to exclude repairmen or stevedores on a pier alongside a vessel in navigable waters. We are unable to agree, except to the mutual exclusiveness of the respective statutes. "If the cause of action arose upon the land, the state law is applicable." *T. Smith & Son* v. *Taylor*, 276 U. S. 179, 181.

The underlying reason for the majority decision in the *Lawson* case appears to be that dry docks and marine railways are used for repairing vessels, and therefore Congress must have intended to include marine railways in the words "any dry dock." That clearly was not the intention of Congress because it expressly provided that the Act covered "only" accidents on navigable waters which state compensation statutes could not provide for, and vessels on dry docks (whether floating or graving) had uniformly been held to be on navigable waters. Vessels are floated into and out of dry docks, but a vessel cannot be floated onto the shore above high water mark, and it was never held until the *Lawson* case that an accident on a vessel ashore above high water was within the exclusive admiralty jurisdiction. Indeed, such accidents were validly covered by the state law before there was any Federal compensation statute.

That dry docks and marine railways are used for the same general purpose would seem beside the point except

when dealing with maritime contract rights. Piers and lighters are both used to load and discharge vessels but it has uniformly been held that an accident to a stevedore on a lighter is within the admiralty jurisdiction whereas an accident to the same stevedore on a pier is within the state jurisdiction.

The Congressional intention and purposes in enacting the Longshoremen's Act is disclosed in the Senate Committee report cited by this Court in *Parker* v. *Motor Boat Sales, Inc., supra,* 314 U. S. at page 249. Nowhere can an intention be found to include marine railways in the words "any dry dock." Congress has recognized a difference between a dry dock and a marine railway, as is clear from the Maritime Lien provision of the Ship Mortgage Act, 1920, 46 U. S. C. § 971, 41 Stat. 1005, which provides:

> "Any person furnishing repairs, * * * use of dry dock or marine railway * * * to any vessel * * * shall have a maritime lien on the vessel * * *."

The lien statute deals with rights under maritime contracts within the admiralty jurisdiction, but when dealing with non-contract matters in the Longshoremen's Act Congress did not specify "any dry dock or marine railway."

This Court granted certiorari, on petition of the United States Attorney General, in the *Norton* case, *supra,* 63 F. 2d 165, which had held that accidents on marine railways were not covered by the Longshoremen's Act (290 U. S. 613); but in 1934 (subsequent to the Circuit Court of Appeals decision in the *Lawson* case) the writ was dismissed, 291 U. S. 641, in a per curiam memorandum decision as follows:

> "As it appears that the Government has now adopted the conclusion that the decision below is correct and no substantial controversy is presented at the bar of this Court, the writ of certiorari herein is dismissed."

The Department of Justice thus appears to have come to the conclusion that an accident ashore on a marine railway was not covered by the Longshoremen's Act, disagreeing with the majority decision in the *Lawson* case.

In 1939 the court below, in *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, 734, followed the decision in the earlier *Lawson* case saying, "We entertain no doubt that in extending the law to cover 'any dry dock' Congress intended to include marine railways."

In 1937 the Supreme Court of Washington held that the State Compensation law applied to an accident on a marine railway track. *Rohlfs* v. *Department of Labor and Industries*, 190 Wash. 566. There the Court said:

> "A marine railway * * * is not like a floating dock or a dry dock into which a vessel which needs repair floats on the surface of the water. Upon a marine railway the boat is hauled, by some power other than its own and not connected with navigation, out of the water and to a point upon the land, * * *. As above stated, it is the law that the same workman, while working alternately on a dock and on a ship attached thereto, varies the nature of his employment as he passes from the dock to the ship and back again. While on the ship, he is within the maritime jurisdiction; while on the dock, he is under the jurisdiction of the state law.
>
> "Respondent was working on land, not on the water; * * *."

Since the decisions in the *Lawson*, *Norton* and *Rohlfs* cases, and the Government's concession that the *Norton* case decision was "correct," the purpose and coverage of the Longshoremen's Act has been stated by this Court in two important cases. In *Parker* v. *Motor Boat Sales, Inc.*, *supra*, 314 U. S. 244, decided in December, 1941, it held an accidental death of a shore employee on a boat on a navigable river was within the Longshoremen's Act because

it was within the admiralty and maritime jurisdiction, and said:

> "There can be no doubt that the purpose of the Act was to provide for federal compensation in the area which the specific decisions referred to placed beyond the reach of the states. *The proviso permitting recovery only where compensation 'may not validly be provided by State law' can not be read in a manner that would defeat this purpose* • • •.
>
> "The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to *correct a gap* made plain by decisions of this Court. We believe that *there is only one interpretation* of the proviso in Section 3(a) *which would accord with the aim of Congress;* the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence." 314 U. S. at pages 249-50. (Italics supplied.)

In *Davis* v. *Department of Labor and Industries, supra,* 317 U. S. 249, decided in December, 1942, this Court reversed a decision of the Supreme Court of Washington that the state compensation law did not apply to the drowning of a worker in a navigable river, saying:

> "March 4, 1927, came the Federal Longshoremen's and Harbor Workers' Act, • • •. Here again, however, *Congress made clear its purpose to permit state compensation protection whenever possible* by making the federal law applicable *only* 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.'" 317 U. S. at pages 252-3. (Italics supplied.)

> "The Washington statute represents a state effort to clarify the situation. Both of these laws show clearly that neither was intended to encroach on the field occupied by the other. * * * In our decision in Parker v. Motor Boat Sales, 314 U. S. 244, we held that Congress has by the Longshoremen's Act accepted the Jensen line of demarcation between state and federal jurisdiction." 317 U. S. at pages 255-6.

The theory of the decision below is that Congress intended the Longshoremen's Act to cover any accidents which Congress had power to provide for, notwithstanding this Court said in *Parker* v. *Motor Boat Sales, Inc., supra,* 314 U. S. 244, that the Longshoremen's Act was intended, and should be interpreted, to provide compensation *only* where the states could not; and in *Davis* v. *Department of Labor and Industries, supra,* 317 U. S. at pages 252-3, this Court said that the purpose of Congress was to *permit state compensation whenever possible.* In other words, this Court has said that state compensation statutes would apply if they could, and the court below held that a state compensation law could not apply since, and because of, the enactment of the Longshoremen's Act. These are contradictory rulings.

Swanson v. *Marra Bros.* (1946), 328 U. S. 1, is not directly in point because it involved a longshoreman's suit under the Jones Act, but this Court clearly disclosed its interpretation of the Longshoremen's Act, in the following:

> "By § 903(a)(1) recovery may be had under the Act only 'if recovery for the disability or death through workmen's compensation proceedings may not be validly provided by State law.'" (p. 6).
>
> "The Senate Judiciary Committee, in recommending the legislation which became the Longshoremen's and Harbor Workers' Compensation Act, expressed *doubt as to the constitutional power of Congress to give recovery to such employees injured on shore,* * * *" (p. 7). (Italics supplied.)

> "But *since this Act is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms* * * * *any remedies against the employer for injuries inflicted on shore.* The Act leaves the injured employees in such cases to pursue the remedies afforded by *the local law, which this Court has often held permits recovery against the employer for injuries inflicted by land torts on his employees* who are not members of the crew of a vessel" (p. 7). (Italics supplied.)

As we understand the decisions in the *Parker*, *Davis* and *Swanson* cases, *supra*, this Court considers the Longshoremen's Act as not applying to injuries ashore because state law can validly afford compensation relief; and that view is clearly disclosed by the expressed intention of Congress and the history of Federal compensation legislation, which was pointed out by this Court in the *Davis* case, *supra*, 317 U. S. at page 252.

The intention of Congress to cover only injuries to which the State Compensation Acts could not validly apply is stated in the Senate Committee Report No. 973 on Senate Bill 3170, 69th Cong., 1st Sess. (cited in the *Davis* case and quoted in the *Parker* case), where it was said (p. 16):

> "Section (3) of the bill describes the persons to be brought within its terms with such exceptions as are *necessary to limit* the operation of the bill to the very persons who are intended to be covered by it." (Italics supplied.)

As pointed out by this Court, Congress enacted a statute to apply only to those maritime workers (except seamen) whose injuries were constitutionally within the exclusive admiralty jurisdiction. It is clearly disclosed by the Senate Committee Report, and by the express language of the Longshoremen's Act, that the purpose of that Act

was to cover *only* injuries which the Constitution would not allow the states to cover.

Even some injuries on navigable water are held not within the exclusive admiralty jurisdiction and therefore subject to state laws, because they are of mere "local concern." *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469; *Millers' Underwriters* v. *Braud*, 270 U. S. 59; *Parker* v. *Motor Boat Sales, Inc.*, *supra*, 314 U. S. 244; *Davis* v. *Department of Labor and Industries*, *supra*, 317 U. S. 249; *Moore's Case*, 323 Mass. 162, affd. sub. nom. *Bethlehem Steel Co.* v. *Moore*, 335 U. S. 874; *Baskin* v. *Industrial Acc. Comm.*, 97 Cal. App. 2d 257, affd. 340 U. S. 886.

This has given rise to what has been referred to as the "twilight zone" to denote injuries occurring on navigable waters for which the states may or may not afford compensation relief, depending on the particular facts of each case. It has led to a great deal of confusion, as evidenced by the case of *Baskin* v. *Industrial Acc. Comm.*, 89 Cal. App. 2d 632, where a shipyard employee, who usually worked ashore, fell into a hold of a ship in navigable waters. The California Compensation Commission denied compensation, and the California Court affirmed on the ground that the accident, occurring on navigable water, was exclusively within the Federal jurisdiction. Rehearing was denied by the State Supreme Court, and this Court granted certiorari and vacated the judgment below and remanded the case to the state court for reconsideration. 338 U. S. 854. The state court then reversed itself and directed the Commissioner to hear and determine the claim, *Baskin* v. *Industrial Acc. Comm.*, 97 Cal. App. 2d 257, and that decision was affirmed by this Court in November, 1950, without opinion. 340 U. S. 886.

The remand and reversal were based upon the decisions in the *Davis* case, *supra*, 317 U. S. 249, and in *Bethlehem Steel Co.* v. *Moore*, *supra*, 335 U. S. 874, affirming *Moore's*

case, *supra*, 323 Mass. 162, which involved injuries on a vessel in a dry dock floating on navigable water.

The characterization "twilight zone" is applied to certain accidents *on navigable waters*, but it has never been applied to injuries ashore. The Longshoremen's Act applies *only* to injuries on navigable waters *and only* if compensation may not validly be provided by state law. As the Circuit Court of Appeals for the First Circuit said in *Royal Indemnity Co.* v. *Puerto Rico Cement Corp.*, 142 F. 2d 237, 239:

> "*Both clauses* must be read together and, *taken together, they describe and limit the maritime field in which the Act was first made operative*, automatically adjusting what the Supreme Court has referred to as the somewhat 'shadowy limits' of that field to any situation." (Italics supplied.)

In *New Amsterdam Casualty Co.* v. *McManigal*, 87 F. 2d 332, 333, the Circuit Court of Appeals for the Second Circuit said:

> "From the foregoing it is apparent that to come within the coverage of the statute the injured employee must satisfy three conditions: (1) in the course of his employment he must sustain *injury upon the navigable waters* of the United States; (2) his employment must be maritime; and (3) his injury must occur *under circumstances which preclude state compensation* laws from providing for recovery." (Italics supplied.)

In the "twilight zone" cases one of the two necessary conditions is always present, i.e., a personal injury or death on navigable water, but the Longshoremen's Act applies only if the state law cannot. If the injury occurs on navigable water (and a dry dock is on navigable water, *Gonsalves* v. *Morse Dry Dock Co.*, 266 U. S. 171; *Bethlehem Steel Co.* v. *Moore*, *supra*, 335 U. S. 874), state laws may

apply if not interfering with the general admiralty jurisdiction. *Davis* v. *Department of Labor and Industries, supra*, 317 U. S. 249; *Baskin* v. *Industrial Acc. Comm., supra*, 97 Cal. App. 2d 257, affd. 340 U. S. 886; *Millers' Underwriters* v. *Braud, supra*, 270 U. S. 59; *Moore's Case, supra*, 323 Mass. 162; *Grant Smith-Porter Ship Co.* v. *Rohde, supra*, 257 U. S. 469.

In the case at bar the deaths did not occur on navigable water nor on a dry dock, which is considered on navigable water. That they occurred on a barge is immaterial as pointed out by this Court in *The Plymouth*, 3 Wall. (70 U. S.) at pages 35-6 and in *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, at pages 59-60:

> "The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters."

The decision below conflicts with opinions of this Court heretofore referred to (including the *Parker*, *Davis* and *Swanson* cases and *Crowell* v. *Benson, supra*); is contrary to the decisions of the Circuit Court of Appeals for the Third Circuit (*Norton* v. *Vesta Coal Co., supra*, 63 F. 2d 165), the District Court in Virginia (*Colonna's Shipyard* v. *Lowe, supra*, 22 F. 2d 843), and The Supreme Court of Washington (*Rohlfe* v. *Department of Labor and Industries, supra*, 190 Wash. 566; *Giske* v. *Austrem, supra*, 1931 A. M. C. 1200); and it construes the Longshoremen's Act contrary to the decisions of this Court, the Circuit Court of Appeals for the First Circuit (*Royal Indemnity Co.* v. *Puerto Rico Cement Corp., supra*, 142 F. 2d 237), the Circuit Court of Appeals for the Second Circuit (*New Amsterdam Cas. Co.* v. *McManigal, supra*, 87 F. 2d 332) and the Circuit Court of Appeals for the Fourth Circuit (*United States Casualty Co.* v. *Taylor*, 64 F. 2d 521).

Conclusion.

A marine railway not being a dry dock, an injury or death on a vessel ashore on it is not within the admiralty jurisdiction and the State of Louisiana can validly provide compensation; and the Deputy Commissioner, whose jurisdiction exists only under, and by virtue of, the Longshoremen's Act had no legal authority to make a compensation award against petitioner and deprive it of its property in the matter. Therefore, it is respectfully submitted that a writ of certiorari should be granted so that this Honorable Court may review the decision of the Court of Appeals for the Fifth Circuit because of the importance of the legal issue involved, and to the end that the Longshoremen's Act may be uniformly applied and the holdings of courts in the various circuits, as well as the state courts, may be in accord with the decisions of this Court.

Respectfully submitted,

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